

**STATE OF MICHIGAN
IN THE SUPREME COURT**

DEAN ALTOBELLI,
Plaintiff-Appellee,

v

**MICHAEL W. HARTMANN, MICHAEL P.
COAKLEY, ANNA M. MAIURI, JOSEPH M.
FAZIO, DOUGLAS M. KILBOURNE, JOHN D.
LESLIE, AND JEROME R. WATSON,**

Defendants-Appellants.

Supreme Court No. 150656

Court of Appeals Docket No. 313470

**Ingham County Circuit Court
Case No. 12-635-CZ**

**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS-
APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

CERTIFICATE OF SERVICE

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COUNTER-STATEMENT OF QUESTION PRESENTED

- I.** SHOULD THIS COURT DENY DEFENDANTS' REQUEST TO REVIEW THE COURT OF APPEALS RULING REFUSING TO SUBMIT THIS CASE TO ARBITRATION WHERE (1) THE CASE-SPECIFIC ISSUE OF ARBITRABILITY THAT THE DEFENDANTS RAISE IS NOT JURISPRUDENTIALLY SIGNIFICANT AND (2) THE COURT OF APPEALS CORRECTLY APPLIED UNAMBIGUOUS CONTRACT LANGUAGE IN REJECTING DEFENDANTS' ARGUMENTS?

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

INTRODUCTION

This case is an individual liability lawsuit relating to Dean Altobelli's ownership position in a law firm, Miller Canfield, Paddock and Stone, P.L.C. (hereinafter "Miller Canfield" or "the firm"), a Michigan professional limited liability company. Mr. Altobelli claims that the seven named defendants engaged in *ultra vires* acts that wrongfully deprived him of his ownership rights without a vote of the firm's owners. Mr. Altobelli alleges that Michael Hartmann, Anna Maiuri and Michael Coakley had personal vendettas against him and that they used their influence to illegally deprive him of his ownership interest in the firm, and the other defendants went along to silence and end Mr. Altobelli's influence and ownership in the firm.

The firm's Operating Agreement contains an alternative dispute resolution clause that sharply deviates from standard arbitration clauses. The coverage of that mandatory arbitration provision is limited by its terms to disputes between the firm and present or past principals of the firm. The firm, however, is not a party to this case and Mr. Altobelli seeks no recovery from the firm. Indeed, the firm itself has filed documents in this case attesting to the fact that it is a non-party. By law, this individual liability case is not against the firm. By law, Mr. Altobelli has every right to sue defendants in court in their individual capacity for committing tortious acts against him.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Dean Altobelli was an attorney at Miller Canfield for 17 years, from 1993 until July 31, 2010. Verified First Amended Complaint, ¶5. At the end of 2005, the more than one hundred Senior Principals of the firm unanimously voted to grant Mr. Altobelli an ownership position in the firm, naming him a Senior Principal. *Id.*, ¶16.

When he became a Principal in the firm, Mr. Altobelli, like every other Principal, became a signatory to the firm's Operating Agreement. Section 3.6 of that Operating Agreement contains an arbitration provision.¹ The first paragraph of that provision defines the scope of arbitration with the following language:

Any dispute, controversy or claim . . . between the Firm or the Partnership and any current or former Principal or Principals of the Firm or current or former partner or partners of the Partnership...of any kind or nature whatsoever...shall be solely and conclusively resolved according to the following procedure...

Operating Agreement (Defendants' Application Exhibit D), §3.6

During the last few years of his tenure with the firm, Mr. Altobelli clashed with defendants over various issues when he exercised, or attempted to exercise his ownership rights. *Id.* As a result of these disputes, defendants retaliated against and threatened Mr. Altobelli. *Id.* Defendants engaged in a series of oppressive actions toward Mr. Altobelli in an attempt to squeeze him out of the firm. *Id.* As just one example, defendants demanded 2100 billable hours from Mr. Altobelli in 2010 despite the fact that the Operating Agreement only called for 1900 billable hours for each Senior Principal and despite the fact that the average Senior Principal contributed less than 1600 hours. The ultimate act of oppression that is the gravamen of this case was defendants' illegal confiscation of Mr. Altobelli's ownership interest in the firm.

For purposes of brevity, Mr. Altobelli refers the Court to the statement of facts in his cross application for leave to appeal that was filed in this Court on January 12, 2015. In short, the core of Mr. Altobelli's complaint in this case is the allegation that defendants wrongfully deprived him of his ownership rights without a vote of the firm's owners.

¹ More accurately, §3.6 of the Operating Agreement outlined a multi-step alternative dispute resolution mechanism that included arbitration. For simplicity purposes and because defendants have referred to §3.6 as an arbitration provision, this brief will do the same.

Mr. Altobelli filed this suit against defendants in the Ingham County Circuit Court in June 2012. In his complaint, Mr. Altobelli sought damages against each of the individual defendants for their tortious conduct directed toward him, with the central component of each claim being each defendant's participation in the deprivation of Mr. Altobelli's ownership rights in the firm. Mr. Altobelli does not seek relief against the firm, and he only sued those individuals who participated in efforts to deprive him of his ownership rights. Mr. Altobelli did not sue all individuals who were managers at the time his ownership rights were cut off, and two of the named defendants, Ms. Maiuri and Mr. Coakley, were not managers at the time they participated in the termination of Mr. Altobelli's ownership rights.

Early on in the case, Mr. Altobelli served a subpoena on Miller Canfield for the production of documents. Miller Canfield resisted that subpoena. In doing so, Miller Canfield confirmed its status as a non party to this case; it filed a motion titled "Non-Party Miller Canfield's Motion to Quash Subpoena" in which it emphasized its non-party status to oppose the production of documents.

In July 2012, defendants filed a motion to compel arbitration under MCR 2.116(C)(7). The circuit court denied defendants' motion, finding that the language in §3.6 of the Operating Agreement was "crystal clear" and that this dispute between principals of the firm is not arguably within the scope of disputes subject to arbitration. Opinion and Order (Defendants' Application Exhibit B), at 5-11. The defendants applied for leave to appeal in the Michigan Court of Appeals which granted that application in an order issued on April 16, 2013.

In a decision dated November 4, 2014, a panel of the Court of Appeals affirmed the circuit court's decision denying defendants' motion for summary disposition based on the arbitration provision of the Operating Agreement. The panel concluded that this case involving

a suit by one firm principal against other firm principals was not within the scope of disputes subject to arbitration under §3.6 of the Miller Canfield Operating Agreement since it was not a “dispute, controversy or claim . . . between the Firm . . . and any current or former Principal . . . of the Firm”:

As the circuit court found, the plain language of the arbitration provision in this case clearly and unambiguously contemplates arbitration of disputes between “the Firm” and “a Principal.” There is no language contained in the operating agreement from which this Court could infer that the arbitration provision contemplated disputes between principals, i.e., between plaintiff and the Firm managers he has sued. We also cannot find that the language of the provision is ambiguous relative to this point. Indeed, as the circuit court observed, the provision “does not even mention disputes between current or former principals.” And, as the circuit court also noted, there are other provisions in the operating agreement that clearly distinguish between the Firm and its principals. For example, the arbitrator selection procedure calls for the arbitration to be conducted by three arbitrators, “one of whom shall be appointed by the Firm, one by the Principal(s) . . . and the third of whom shall be appointed by the first two arbitrators.” As the circuit court observed, “In a dispute solely between current or former principals, the Firm would not be a party, yet the only provision governing arbitrator selection requires the Firm in all instances to select one of the arbitrators.” In *Rooyakker [& Sitz PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007)], this Court stated that when interpreting arbitration clauses, “[t]he court should resolve all conflicts in favor of arbitration.” *Rooyakker*, 276 Mich.App. at 163, 742 N.W.2d 409. However, because of the clear and unambiguous language restricting the arbitration requirement to disputes between “the Firm” and “a Principal,” there is no conflict requiring resolution.

Opinion (Defendants’ Application Exhibit A), at 10.

The defendants have now filed an application for leave to appeal in which they ask this Court to review and reverse the Court of Appeals decision refusing to send this individual liability dispute to arbitration.

ARGUMENT

I. THIS COURT SHOULD DENY DEFENDANTS' REQUEST TO REVIEW THE COURT OF APPEALS DETERMINATION THAT THIS CASE IS NOT SUBJECT TO ARBITRATION.

The defendants seek review of the Court of Appeals ruling affirming the circuit court's determination that this case is not covered by the arbitration provision of the Miller Canfield Operating Agreement. There are two general reasons why this Court should decline defendants' invitation to review this issue.

First, the impact of the Court of Appeals decision on the arbitration question in this case is limited and narrow. Arbitration is a matter of contract and disputes such as this one over the meaning of contractual arbitration provisions are necessarily case specific. Moreover, as will be seen, the arbitration clause at issue here is highly unique, substantially deviating from standard arbitration clause language. As a result, despite defendants' animated protestations to the contrary, the issue that they present to the Court is lacking jurisprudential significance.

Defendants attempt to artificially inflate the significance of the Court of Appeals ruling by suggesting that it threatens to negate arbitration clauses "commonly used by business entities throughout Michigan." Defs' Brief, at v. Putting aside for a second the fact that there is absolutely no evidence that anybody else in this state is writing arbitration agreements that look like the one involved in this case, the fact remains that the "adverse" effects of the Court of Appeals ruling, if they exist at all, could be fixed with a few well-placed key strokes. If the principals of Miller Canfield wish to adopt an arbitration provision that encompasses not only disputes between the firm and its principals, but also disputes between principals, they need only take the less-than-onerous step of amending §3.6 of the Operating Agreement to include disputes between principals as the subject of binding arbitration. To the extent there could possibly be

any unappreciated spill-over effect from the Court of Appeals decision in this case, that effect can be eradicated by the simple expedient of rewriting any arbitration agreement that might look like the unusual one at issue here.

There is a second significant reason why the Court of Appeals decision regarding arbitration must be left undisturbed. In recent years, this Court has set out some fairly specific instructions as to how contracts such as Miller Canfield's Operating Agreement are to be read and applied. The Court of Appeals followed these instructions to the letter. It read §3.6 of that agreement precisely how the parties wrote it. In interpreting the arbitration provision as it was written, the Court of Appeals did not err in concluding that this case is not subject to binding arbitration. The remainder of this brief will be addressed to why the Court of Appeals holding as to the arbitration clause was entirely correct.

The beginning point in all that follows is the basic principle that arbitration is a matter contract. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98; 323 NW2d 1 (1982); *Miller v Miller*, 474 Mich 27, 32; 707 NW2d 341 (2005). As this Court has emphasized, the "bedrock principle of American contract law [is] that parties are free to contract as they see fit." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 766 (2003); *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). Consistent with this significant freedom that parties have to govern their affairs by contract, parties entering into an agreement to arbitrate "are free to make that promise as broad or as narrow as they wish." *Port Huron School District v Port Huron Education Ass'n*, 426 Mich 143, 151, n. 6; 393 NW2d 811 (1986), quoting *United Steelworkers v American Mfg Co*, 363 US 564, 570 (1960) (J. Brennan, concurring).

The contractual underpinnings of arbitration further dictate that a party cannot be required to submit to arbitration a dispute that he has not agreed to resolve in this manner.

Arrow Overall, 414 Mich at 98; *Kaleva-Norman-Dickson School District No. 6 v Kaleva-Norman-Dickson Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975).

This case involves the interpretation of a contractual arbitration provision. The same principles of interpretation that govern all contracts must be applied in this circumstance as well. *Wold Architects and Engineers v Strat*, 474 Mich 223, 248; 713 NW2d 750 (2006) (J. Corrigan, concurring). The Court outlined the general principles of contract interpretation in *In re Egbert R Smith Trust*, 480 Mich 19; 745 NW2d 754 (2008):

In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law.

Id., at 24.

This Court has stressed repeatedly in recent years that the fundamental right to make and enforce contracts fuels a “fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*.” *Bloomfield Estates Improvement Ass'n, Inc. v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007) (emphasis in original). Judges do not have the authority “to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties.” *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). The bedrock principle of freedom of contract can only be served “by requiring courts to enforce unambiguous contracts according to their terms.” *Quality Products and Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 370; 666 NW2d 251 (2003); *Wilkie*, 469 Mich at 52.

Consistent with the fundamental principle that contracts must be enforced as they are written, this Court has required that courts must “give effect to every word, phrase and clause in

a contract and avoid an interpretation that would render any part of the contract surplusage. *Klapp v United Insurance Group Agency, Inc.*, 468 Mich 459, 468; 663 NW2d 447 (2003); *Miller-Davis Co v Ahrens Construction, Inc.*, 495 Mich 161, 174; 848 NW2d 95 (2014) (“we avoid an interpretation that would render any portion of the contract nugatory.”)

This Court’s unwavering commitment to the literal interpretation of contract language demands the immediate rejection of one of the principal themes in defendants’ application. Defendants take the position that the result reached in this case is to be influenced by a public policy “favoring” arbitration. Defendants dedicate one whole subsection of the brief in support of their application to the following: “The Principles That Require Reversal In This Case Grow Out Of The General Rules Favoring Arbitration.” Defs’ Brief, at 18. Defendants are categorically wrong in suggesting that the law’s purported “favoritism” toward arbitration has any role to play in the legal issues raised in this case.

This case is about the interpretation of a contractual arbitration provision. As this Court has stressed with frequency and consistency, that contractual provision is at the center of this application and it must be enforced as it was written. That contract language is not to be construed “broadly” to accommodate some unwritten rule that judges are supposed to look upon arbitration with favor. Nor is selected language in that provision to be ignored simply to advance a claimed public interest in resolving disputes through arbitration. Rather, the arbitration provision of the Operating Agreement, like every other contract that comes before a Michigan court, is to be interpreted precisely as it is written. *Cf Quality Products*, 469 Mich at 373, n . 4 (“an implied-in-law contract cannot contradict an express contract on the same subject.”)

The Supreme Court of the United States made this point quite forcefully in *Granite Rock Co v International Brotherhood of Teamsters*, 561 US 287 (2010). In that case, the defendant

(Local) argued that the parties' dispute had to proceed to arbitration. In support of that contention, the defendant cited the general "federal policy favoring arbitration of labor disputes." The Supreme Court in *Granite Rock* rejected the contention that this public policy favoring arbitration could impact the question of whether the parties' agreement called for the arbitration of a particular dispute:

The language and holdings on which Local and the Court of Appeals rely cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly "a matter of consent" and thus "is a way to resolve those disputes – *but only those disputes* – that the parties have agreed to submit to arbitration.

Id., at 299 (emphasis in original).

The Supreme Court went on in *Granite Rock* to explain that any "presumption" in the law favoring arbitration could not affect the determination of whether a particular dispute is subject to arbitration under the parties' agreement:

Local is thus wrong to suggest that the presumption of arbitrability we sometimes apply takes courts outside our settled framework for deciding arbitrability. The presumption simply assists in resolving arbitrability disputes within that framework. Confining the presumption to this role reflects its foundation in "the federal policy favoring arbitration." As we have explained, this "policy" is merely an acknowledgment of the [Federal Arbitration Act's] commitment to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." Accordingly, *we have never held that this policy overrides the principle that a court may submit to arbitration "only those disputes ... that the parties have agreed to submit."* Nor have we held that courts may use policy considerations as a substitute for party agreement.

Id., at 302-303 (emphasis added).²

² In their application, defendants cite several federal court decisions purportedly favorable to their position. Defendants claim that these decisions are based on the Federal Arbitration Act (FAA), 9 USC §1, *et seq* which according to defendants, "evinces a strong preference for arbitration and is binding upon state courts." Defs' Brf., at 10, n. 2. Defendants' (mis)use of these federal precedents is a subject that will be taken up later in this brief. For now, what must be emphasized is that the FAA in no way diverges from this Court's approach to contract interpretation in general or the interpretation of contractual arbitration provisions in particular.

This Court’s contract-law jurisprudence is completely in line with the observations of the Supreme Court made in *Granite Rock*. See also *EEOC v Waffle House, Inc.*, 534 US 279, 294 (2002) (“we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.”) Michigan courts cannot “use policy considerations as a substitute for party agreement.” It is the language of §3.6 of the Operating Agreement, not some nebulous policy or presumption favoring arbitration that governs whether this particular dispute is subject to arbitration. It is, therefore, appropriate to begin (and end) analysis of the issue presented in this case with the critical language from that provision:

“Any dispute, controversy or claim . . . *between the Firm or the Partnership and any current or former Principal or Principals of the Firm* . . . of any kind or nature whatsoever...shall be solely and conclusively resolved according to the following procedure...”

Operating Agreement (Defendants’ Application Exhibit D),
§3.6 (emphasis added).

The Supreme Court of the United States has stressed that the principal purpose of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms.” *Volt Information Services, Inc. v Board of Trustees of Leeland Stanford Junior University*, 489 US 468, 478 (1989); *A T & T Mobility LLC v Concepcion*, ___ US ___, 131 S Ct 1740, 1748 (2011). Moreover, consistent with this Court’s decisions in *Arrow Overall* and *Kaleva-Norman*, the Supreme Court has recognized that “a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*.” *Granite Rock*, 561 US at 297 (emphasis in original). Since arbitration is “strictly a matter of consent,” it is “a way to resolve those disputes – *but only those disputes* – that the parties have agreed to submit to arbitration.” *Id.*, at 299 (emphasis in original). See also *EEOC v Waffle House, Inc.*, 534 US 279, 294 (2002) (“we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract . . .”). In addition, under federal law, parties “are generally free to structure their arbitration agreement as they see fit.” *Stolt-Nielson SA v Animalfeeds Int Corp*, 559 US 662, 683 (2010). This means that “parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes.” *A T & T Mobility*, 131 S Ct at 1748-1749.

For purposes of the argument that defendants advance in support of the arbitrability of this dispute, the Operating Agreement's arbitration provision is notable both for words that it contains as well as words that it does not contain. Defendants attempt to impress upon the Court that the arbitration provision is broadly written since "it mandated arbitration of '[a]ny dispute, controversy or claim' of 'any kind or nature whatsoever.'" Defs' Brf., at 16. There is no doubt whatsoever that the types of disputes between the firm and a firm principal that could trigger the arbitration provision is limitless; the mechanisms for resolution set out in §3.6 of the Operating Agreement apply to *any* dispute of any kind or nature between the firm and one or more of its principals.³

But while the *types* of disputes subject to the arbitration provision are boundless, the arbitration provision has one significant limitation as to its scope. It specifies *who* those disputes must be between. The arbitration provision specifically limits its coverage to disputes "*between the Firm . . . and any current or former Principal or Principals of the Firm. . .*" (emphasis added). By its unambiguous terms, §3.6 of the Operating Agreement declares that disputes, controversies or claims between the firm and a past or present principal must proceed to arbitration. Since this case is *not* a dispute, controversy or claim between the firm and Mr. Altobelli, this case is not covered by the arbitration provision.

All that the Court of Appeals did in its November 4, 2014 opinion was to give effect to this explicit limitation in the arbitration clause of the Operating Agreement. All that the defendants have done in their application for leave to appeal is to ignore this limitation. But, as this Court has emphasized, the language in the arbitration agreement indicating that arbitration

³ Indeed, as will be seen, unlike standard arbitration agreements imbedded in most other contracts, this arbitration agreement is not even confined to disputes that arise out of or are related to the Operating Agreement itself.

only applies to disputes between the firm and its present or former principals cannot be ignored. This language must be given effect; it cannot be treated as surplusage. *Klapp*, 468 Mich at 468; *Miller-Davis*, 495 Mich at 174.

The arbitration provision of the Operating Agreement not only explicitly reserves arbitration for disputes between the firm and its principals, other parts of §3.6 of the Operating Agreement confirm that this document contemplates only such disputes proceeding to arbitration. Thus, the sole method prescribed in §3.6(a) of the Operating Agreement for the selection of arbitrators for all disputes to be resolved under the agreement indicates:

“There shall be three (3) arbitrators; one of whom shall be appointed by the Firm, one by the Principal(s) and/or partner(s) (as applicable) and the third of whom shall be appointed by the first two arbitrators.”

Operating Agreement (Defendants Application Exhibit D),
§3.6(a).

The arbitration provision expressly states that the firm “shall” appoint one of the three arbitrators, while a second is to be appointed by the principals on the opposite side of the dispute with the firm. The language in §3.6(a) providing that disputes subject to arbitration are to be resolved solely by a procedure where the firm shall select one of the three arbitrators reinforces the fact that the parties intended to only require arbitration of disputes with the firm.

As noted previously, the Miller Canfield Operating Agreement’s arbitration provision is also noteworthy for language that was not included in that clause. That provision does *not* contain what is considered standard language that would limit the scope of arbitration. Generally, arbitration clauses limit mandatory arbitration to disputes “arising out of or relating to” the provisions of the agreement. Attached to this brief as Exhibits 1 and 2 are standard arbitration clauses of the American Arbitration Association, the International Institute for Conflict Prevention & Resolution and Jams. All of these set out standard arbitration clause

language indicating that arbitration will be used to resolve any disputes “arising out of or relating to” the parties’ agreement.⁴ This standard language was not used in §3.6 of the Miller Canfield Operating Agreement. Instead, that agreement contains no limitation on the types of disputes against the firm that are subject to arbitration – it applies to disputes, controversies or claims “of any kind or nature whatsoever.”

There are, therefore, two unique features of the Operating Agreement’s arbitration provision. First, in an agreement to which over 100 principals were signatories, that provision limits arbitration solely to disputes between the firm and one or more of its principals. Second, arbitration is not confined to disputes between the firm and its principals that arise out of the Operating Agreement itself. As written, arbitration provides the method of resolving any dispute “of any kind or nature whatsoever” between the firm and one or more of its principals.

In the face of these two unique features of the arbitration clause at issue in this case, defendants offer a completely unintelligible assessment as to how the Court of Appeals erred in reaching the result that it did. Defendants claim in their application: “The Court of Appeals reached the wrong conclusion because it addressed the wrong question. The panel focused on the identity of the actors, not the nature of the claim. This Court has ruled that the nature of the claim, not the identity of the actors, governs decisions on arbitrability.” Defs’ Brief, at 1.

This statement is hopelessly wrong. Where, as here, the unequivocal language of the parties’ agreement limits arbitration to one particular set of disputants, *the identity of the parties in the dispute is absolutely essential to any determination of arbitrability*. And where, as here, the arbitration agreement is written so broadly that it covers *any* controversy of *any* kind

⁴ Miller Canfield lawyers have specifically instructed firm lawyers to employ such standard language when drafting arbitration agreements for their clients. See Miller Canfield’s “Model Arbitration Provision (Exhibit 3).

whatsoever, *the “nature of the claim” being asserted is of no consequence whatsoever* – whatever that claim is, it will be subject to arbitration provided that it is a dispute between the firm and one or more of its principals.

The unlimited scope of the types of disputes that are subject to arbitration under §3.6 of the Operating Agreement leads to another ramification of defendants’ misguided argument. Since there are no limits on the types of disputes that must proceed to arbitration under §3.6 of the Operating Agreement, the only limitation on arbitrability is the fact that it applies only to disputes between the firm and one or more of its principals. Defendants, however, ask this Court to write this limitation out of the Operating Agreement, thereby requiring disputes between principals to proceed to arbitration as well. Since the arbitration clause calls for a multi-layered resolution of “[a]ny dispute, controversy or claim . . . of any kind or nature whatsoever,” regardless of whether that dispute arises out of the Operating Agreement or not, the scope of the arbitration clause would reach stunning proportions if defendants had their way and §3.6 were rewritten to include disputes *between* principals.

To get a flavor of the reach of this provision under defendants’ attempted re-write of §3.6 of the Operating Agreement, consider the following hypothetical: Assume Miller Canfield has a firm softball team that is co-managed by two firm principals both of whom are, of course, signatories to the firm’s operating agreement. Approaching one of the season’s biggest games, one of the two co-managers decides that the starting pitcher should be the team’s ace left-hander. The other co-manager vigorously disagrees, concluding that the team’s star right-handed pitcher holds out the best prospects for success in the big game.

How does this disagreement between two firm principals get resolved? In the terminology of the arbitration provision of the Operating Agreement, what we have here is a

“dispute, controversy or claim.” That dispute or controversy happens to be between two firm principals – a dispute that is, according to defendants, covered by the arbitration provision of the Operating Agreement.

Since the arbitration clause extends to a dispute, controversy or claim “of any kind or nature whatsoever,” and since the arbitration clause in no way confines its reach to disputes, controversies or claims that arise out of the Operating Agreement, the only logical conclusion to be reached is that if defendants’ position were adopted and the language in §3.6 limiting arbitration to disputes between the firm and its principals can be safely ignored, our hypothetical softball manager dispute would have to be resolved through the procedures outlined in §3.6 of the Operating Agreement. Indeed, under defendants’ misreading of §3.6, there would be no limit to the disputes between two or more firm principals that would have to be arbitrated under §3.6 of the Operating Agreement.

Defendants cannot escape the unambiguous language of §3.6. They cannot avoid the fact that the agreement to which they and Mr. Altobelli are signatories expressly limits arbitration to disputes between the firm and its principals. What defendants offer, instead, is no more than various diversions, arguments that attempt to direct the Court’s attention anywhere other than where it has to be – on the text of §3.6 itself.

A. The Court of Appeals Decision in *Rooyaker* Has No Bearing On This Case.

For example, defendants place considerable emphasis on the Court of Appeals prior opinion in *Rooyakker & Sitz v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), going so far as to suggest that the panel in this case was obligated to follow the holding in that case under MCR 7.215(J). Defendants’ analysis of *Rooyakker* comes up significantly short.

The plaintiffs in *Rooyakker* were accountants who had been employed by Plante & Moran. During the course of that employment, the plaintiffs signed an employment agreement with Plante & Moran. That agreement contained an arbitration provision which contained the standard language discussed above: “any dispute or controversy arising out of or relating to this Agreement, may be settled by arbitration . . .”

The plaintiffs later resigned from Plante & Moran and opened their own accounting office. Plante & Moran asserted that these actions constituted a violation of the employment agreement that plaintiffs had signed. Plaintiffs filed suit seeking a declaratory judgment that they had not breached their employment agreement. Plaintiffs also named as defendants in that case two agents of Plante & Moran, alleging tortious interference and defamation claims against them.

The circuit court in *Rooyakker* granted summary disposition to the defendants on their argument that any claims related to the employment contract had to be resolved through arbitration. Plaintiffs appealed that decision to the Court of Appeals.

On appeal, plaintiffs argued for the first time that arbitration could not be ordered as to their claims against the two employees of Plante & Moran because they were not signatories to the arbitration agreement. The panel proceeded to rule in *Rooyakker* that the language in the arbitration provision of the plaintiffs’ employment agreement was expansive enough to compel arbitration even on the plaintiffs’ claims against the two nonsignatories to the employment agreement:

In this case, the broad language of the arbitration clause – “any dispute or controversy arising out of or relating to” the agreement – vests the arbitrator with the authority to hear plaintiffs’ tortious interference and defamation claims, even if they involve nonparties to the agreement . . . Therefore, we do not believe that the trial court erred in referring plaintiffs’ tortious interference and defamation

claims to arbitration because they arise out of or relate to the individual plaintiffs' past employment with Plante & Moran.

Id., at 163-164.

The defendants use some overheated rhetoric to characterize the Court of Appeals treatment of *Rooyakker* in its November 4, 2014 opinion. According to defendants, the ruling of the panel in this case “scoffs at” *Rooyaker*; it demonstrates “disrespect” for the holding in that case and “ignored” this prior precedent. Defs’ Brief, at vi, 2. What defendants do not do, however, is explain how it is that the holding in *Rooyakker* actually offers support for their position in this case.

The simple fact is that it does not. *Rooyakker* is a decision that is predicated on the language of the arbitration provision in the employment agreement that the plaintiffs and Plante & Moran signed in that case. All that the Court of Appeals did in *Rooyakker* was to find that the expansive language in that agreement – making arbitration the appropriate method for resolving “any dispute or controversy arising out of or relating to the agreement” – was sufficient to allow arbitration as to nonsignatories to the agreement.

What was obviously *not* involved in *Rooyakker* was language in the arbitration provision comparable to that involved here limiting arbitration to disputes “between the Firm . . . and any current or former Principal or Principals of the Firm.” *Rooyakker*, therefore, did not address the critical language in §3.6 of the Operating Agreement that defendants steadfastly ask this Court to ignore. Since the holding in *Rooyakker* was premised on the particular language of the arbitration agreement in question and because the arbitration agreement at issue here differs in this essential respect, *Rooyakker* does not control. The Court of Appeals, which was charged with the obligation of giving effect to every word in the arbitration agreement before it, did not err in distinguishing *Rooyakker*.⁵

It should be noted that *Rooyakker* differs from this case in one other material respect. The “novel” issue presented to the Court of Appeals in that case was whether nonsignatories to an arbitration agreement could compel arbitration of the claims against them under the specific terms of the arbitration provision at issue in that case.

In this case, by contrast, the defendants are not strangers to the Operating Agreement that Mr. Altobelli signed. Rather, the defendants are signatories to that agreement just like Mr. Altobelli. This fact does nothing to change the language of §3.6 – the determinative issue in this case. But, the fact that each of the defendants were signatories to the Operating Agreement highlights the fact that if the parties wanted to encompass within the arbitration provision any disputes between principals, as defendants now ask the Court to read §3.6, the parties could easily have done so. The fact that these signatories did not insist on such language provides further proof that the Court of Appeals reached the appropriate result here.⁶

⁵ Since the holding in *Rooyakker* is of no consequence to the result in this case, there is no reason to debate the propriety of that holding. Plaintiff would note, however, that several comments in that opinion are impossible to harmonize with this Court’s general approach to contract law. For example, the Court in *Rooyakker* cited prior Court of Appeals opinions for the proposition that the court “should not allow the parties to divide their disputes between the court and the arbitrator.” 276 Mich App at 163. In light of the basic principle that “parties are free to contract as they see fit,” *Wilkie*, 469 Mich at 51, *Quality Products*, 469 Mich at 370, and parties entering into promises to arbitrate disputes “are free to make that promise as broad or as narrow as they wish,” *Port Huron School District*, 426 Mich at 151, n. 6, there is no valid reason why parties cannot choose what issues are to be subject to arbitration or with whom they agree to arbitrate disputes. To the extent the *Rooyaker* Court held otherwise, that decision is not correct. Additionally, the Court of Appeals in *Rooyakker* seemed to find support for its conclusion that nonparties to an arbitration agreement could have claims against them arbitrated based on the strong public policy favoring arbitration. 276 Mich App at 163. To repeat, arbitration is a matter of contract and it has to be the language of the contract that governs arbitrability uninfluenced by concerns for “public policy.”

⁶ Defendants also cite three unpublished cases of the Court of Appeals which, like *Rooyakker*, do not assist in the resolution of this case. Defs’ Brf, at 13-15. In all three cases, the arbitration agreement had standard “arising out of” language and none of them had the “between” language that is the distinctive feature in the arbitration provision here. See *Cullen v Klein*, Court of Appeals No. 291810 (Defendants’ Application Exhibit F) (calling for the arbitration of “Any dispute or controversy arising out of or related to this Agreement; *Beaver v Cosmetic*

B. The Federal Cases On Which Defendants Rely Are Of No Help To Defendants.

Defendants further cite a trio of federal court cases that follow the same pattern as *Rooyakker*. See *Arnold v Arnold Corp*, 920 F2d 1267 (6th Cir. 1990); *Pritzker v Merrill, Lynch, Pierce, Fenner & Smith*, 7 F3d 1110 (3rd Cir. 1993); *Roby v Corporation of Lloyd's*, 996 F2d 1353 (2nd Cir. 1993). All three of these cases presented the question of whether claims against nonsignatories to a contract containing an arbitration agreement, who were agents of a party who had signed that agreement, should proceed to arbitration. In all three cases, the federal courts held that the language in the arbitration agreement was broad enough to encompass the claims against the nonsignatory agents.

But, as in *Rooyakker*, the arbitration provisions involved in *Arnold* and *Roby* were silent on the question of the identity of the disputants who could proceed to arbitration. Neither of these cases involved arbitration clause language specifying that arbitration was agreed to only as to disputes between the plaintiff and the principal of the nonsignatories. Obviously, the same is not true here.⁷ Cf *Stolt-Nielson SA v Animal Feeds Int. Corp.*, 559 US 662, 683 (2010); *A T & T*

Dermatology & Vein Centers, Court of Appeals No. 253568 (Defendants' Application Exhibit G) (Employment contract specifying: "I hereby agree that any dispute that arises out of that relates to employment . . . shall be resolved by arbitration."); *Vandekerckhove v Scarfone*, Court of Appeals No. 303130 (Defendants' Application Exhibit H) (retainer agreement with an attorney's single member professional corporation indicating "[a]ny controversy, dispute or claim arising out of our [*sic*] relating to our fees, charges, performance . . . [or] obligations . . . shall be resolved through binding arbitration . . .").

⁷ The central question presented in *Arnold*, *Roby* and *Pritzker* was whether a nonsignatory to an arbitration agreement could compel the arbitration of a claim. While the legal question of the arbitration of claims asserted against nonsignatories is of no relevance to this case inasmuch as defendants are signatories to the same agreement as Mr. Altobelli, it should be noted that the federal appeals courts are not in agreement as to the arbitration rights of nonsignatories. *McCarthy v Azure*, 22 F3d 351 (1st Cir. 1994). The *McCarthy* Court rejected the defendant's argument built on *Arnold*, *Roby* and *Pritzker* and held that a suit against a corporate officer was not covered by an arbitration agreement signed by the plaintiff. For what it is worth, since *Arnold*, *Pritzker* and *Roby* were decided, the Supreme Court of the United States has cast some doubt on a central component of these decisions. In *EEOC v Waffle House*, the Court flatly declared in a case involving the Federal Arbitration Act: "It goes without saying that a contract

Mobility LLC v Concepcion, ___ US ___; 131 S Ct 1740, 1748-1749 (2011) (recognizing that under the Federal Arbitration Act, “parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes.”) (emphasis in original).

The *Pritzker* case is slightly different. In *Pritzker*, the plaintiffs were trustees of a pension plan subject to the Employee Retirement Income Security Act of 1974, 29 USC §1001, *et seq*, (ERISA) who opened Cash Management Accounts with Merrill Lynch, Pierce, Fenner and Smith (Merrill Lynch). At the time these accounts were opened, plaintiffs and Merrill Lynch signed an agreement that included an arbitration clause. That arbitration clause specified in part that “all controversies which may arise between us . . . shall be determined by arbitration . . .”

Plaintiffs later filed suit under ERISA against Merrill Lynch and two other defendants, one of Merrill Lynch’s wholly owned subsidiaries and a financial consultant employed by Merrill Lynch. The defendants argued that all of plaintiffs’ claims had to be resolved through arbitration under the terms of the agreement plaintiffs signed with Merrill Lynch.

The central issue addressed by the Third Circuit in *Pritzker* was whether claims alleging a violation of ERISA could be subject to arbitration at all. The panel in *Pritzker* overruled prior precedent and concluded that parties could agree to arbitrate such claims. 7 F3d at 1115-1121. After concluding that the claims based on ERISA could be subject to arbitration, the remaining issue addressed by the Court in *Pritzker* was whether the plaintiffs’ claims against the two defendants who were not signatories to the account agreement could require that plaintiffs’ claims against them be resolved through arbitration.

cannot bind a non-party.” 534 US at 294.

The *Pritzker* Court determined that it would follow the lead of the Sixth Circuit in *Arnold* as it concluded that plaintiffs' claims against Merrill Lynch's employee and its wholly owned subsidiary had to proceed to arbitration. *Id.*, at 1121-1122. However, in reaching this decision, the Third Circuit in *Pritzker* engaged in no discussion of the significance of the language in the arbitration clause specifying that the disputes subject to arbitration consisted only of those "between us," *i.e.* between Merrill Lynch and the plaintiffs.

The apparent lesson to be derived from *Pritzker* is that the federal court in that case was free to ignore language in the parties' agreement limiting arbitration to a dispute between two particular parties. Under the case law emanating from this Court on the interpretation of contract language, the same approach was not available to the Court of Appeals in this case.

Finally, defendants make much of an observation contained in the Sixth Circuit's decision in *Arnold*. The Sixth Circuit in *Arnold* asserted that if the plaintiffs could avoid arbitration by naming "nonsignatory parties as [defendants] or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." 920 F2d at 1281. Defendants latch on to this quotation, suggesting that Mr. Altobelli's claims against these individual defendants constitutes some sort of impermissible "end run" around the arbitration clause.

The defendants' reference to *Arnold* and their assertion that this case represents an "end run" around arbitration simply fails to take into account the essential contractual character of arbitration. The question presented in this case is whether the dispute between the parties is subject to arbitration under the language in §3.6 of the Operating Agreement. A dispute either is or it is not arbitrable under that language. If, as it turns out in this case, the parties' dispute is *not*

subject to arbitration under the express language of the arbitration clause, that result cannot be changed by the mere pronouncement that it would “nullify” the effect of arbitration.

Finally, if as defendants now loudly claim, a literal application of the language of §3.6 somehow undermines the scope of arbitration as defendants envision it, the defendants can correct this “problem” with ease. All they need to do is rewrite §3.6 and change the language limiting arbitration to disputes between the firm and its principals.

C. This Court’s Summary Order In *Hall v Stark Reagan* Plays No Role In This Case.

According to defendants, the Court of Appeals in its November 4, 2014 decision also “ignored the lesson” of this Court’s summary order in *Hall v Stark Reagan, P.C.*, 493 Mich 903; 823 NW2d 274 (2012). Outside of the fact that *Hall* involved the interpretation of an arbitration clause in an agreement between members of a law firm, that case has no points of intersection with this one. *Hall* has nothing to say about the appropriate interpretation of the arbitration clause at issue here.

In *Hall*, the plaintiffs were two shareholders in the defendant law firm. When they became shareholders, the plaintiffs signed a shareholders’ agreement. That agreement included an arbitration clause which indicated that “[a]ny dispute regarding interpretation or enforcement of any of the parties rights or obligations hereunder shall be resolved by binding arbitration . . .”

Approximately five years after the plaintiffs were made shareholders, their positions were terminated by a vote of the shareholders. Plaintiffs brought suit, alleging that their terminations were the product of unlawful age discrimination.

The defendants moved for summary disposition on the grounds that the plaintiffs’ claims were subject to arbitration under the shareholders’ agreement. This issue revolved around the highly case-specific question of whether the plaintiffs’ age discrimination claims presented a

dispute regarding the “interpretation or enforcement of any of the parties’ rights or obligations” under the shareholders’ agreement. A two person majority of the Court of Appeals ruled that the discrimination claim did not implicate any provisions of the shareholders’ agreement. *Hall v Stark Reagan PC*, 294 Mich App 88; 818 NW2d 367 (2011).

This Court reversed that decision by order. *Hall*, 493 Mich 903. The Court reached this result based on the following analysis of the plaintiffs’ claims and the wording of the arbitration provision of the parties’ contract:

The dispute in this case concerns the motives of the defendant shareholders in invoking the separation provisions of the Shareholders’ Agreement, Article 8.1 and/or Article 9.1, with respect to the plaintiffs. This is a “dispute regarding interpretation or enforcement of . . . the parties’ rights or obligations” under the Shareholders’ Agreement, and is therefore subject to binding arbitration pursuant to Article 14.1 of the Agreement.

Id.

According to defendants, the “lesson” that the Court of Appeals should have gleaned from the brief order issued by the Court in *Hall* is that courts “must give arbitration clauses a broad reading.” Defs’ Brief, at 19. It should be noted that such an interpretation of *Hall* would be antithetical to this Court’s consistent approach to contract language. Contract language is not to be given a “broad reading” or a “narrow reading.” Contract language is merely *read*. And it is read and applied as the parties wrote it, neither more broadly nor more narrowly.

But, even if defendants’ dubious take on this Court’s summary order in *Hall* were correct, it still would do them no good. Let us assume that *Hall* stands for the principle that arbitration provisions are subject to a broad reading. *Hall*, however, cannot stand for the proposition that courts are to give arbitration provisions a *misreading*. Nor does *Hall* stand for the principle that courts in the interest of submitting disputes to arbitration may rewrite the parties’ agreement or ignore critical language that the parties happened to place into an arbitration agreement.

The problem for the defendants in this case is that they are not in need of a “broad reading” of §3.6 of the Operating Agreement; they are in need of a *misreading* of that provision. They are in need of a court that is willing to disregard the fact that §3.6 specifically states that arbitration is reserved for disputes “between the Firm . . . and any current or former Principal or Principals of the Firm.” The defendants have come to the wrong court to get a ruling like that.

D. Defendants’ Reliance On §3.3 Of The Operating Agreement Is Misplaced.

Defendants’ further seek to rewrite the plain terms of the arbitration clause by asserting that the result in this case should be dictated by the boilerplate provision found in §3.3 of the Operating Agreement. That section of the agreement simply specifies that the principals who are signatories to the Operating Agreement, along with their executors, administrators and assigns, are bound by the terms of the agreement. Section 3.3 states: “The covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective executors, administrators and assigns.” Operating Agreement, §3.3.

It is worth noting that this argument based on §3.3 was not raised by defendants in either the circuit court or the Court of Appeals. There is a very good reason why it was not. There is no merit whatsoever to this argument.

Defendants entire argument based on §3.3 of the Operating Agreement is confined to the following two sentences in their application:

Section 3.3 of the Operating Agreement provides that the “covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective executors, administrators and assigns” (emphasis added). All Firm principals, including Plaintiff and each individual Defendant, had signed and were “parties” to the Operating Agreement when this dispute began, and all were entitled to coverage under its arbitration clause.

Defs’ Brf., at 4-5 (emphasis in original).

In their brief, defendants underline the words “to the benefit of and be binding upon the parties hereto” in quoting from §3.3. By doing so, defendants are apparently taking the position that the generic contract language in §3.3 providing that the Operating Agreement is binding on the signatories somehow becomes the basis for amending one of the substantive provisions of that Agreement. This argument is preposterous.

The arbitration clause in the Operating Agreement speaks directly to the scope of arbitral disputes and it explicitly specifies which disputes will be subject to arbitration. As signatories, defendants are bound by the terms of §3.6 of the Operating Agreement that unambiguously confine the scope of mandatory arbitration to disputes between the firm and its present or former principals. For signatories like defendants, §3.3 says nothing more than that they cannot disavow the other terms of the Operating Agreement, *including the terms of the arbitration clause itself*. Defendants, therefore, cannot transform a provision in the Operating Agreement that serves to confirm that they are bound by the terms of that agreement into a provision that would substantially modify at least one of the terms of that agreement.

Mr. Altobelli does not take issue with defendants’ observation that, as parties to the Operating Agreement, they are “entitled to coverage under its arbitration clause.” Defs’ Brf., at 5. Indeed, the entire point of Mr. Altobelli’s position in this case is that defendants are entitled to the coverage of that clause precisely the way it was written. But as written, §3.6 does not call for the arbitration of this individual liability case between principals and §3.3 does nothing to change that fact.

E. Conclusion.

Defendants try to escape the clear terms of the arbitration provision by painting Mr. Altobelli negatively for suing them individually and by mischaracterizing this case as one against

the firm. This is not a case against the firm; it is an individual liability suit for money damages brought against the individual defendants. Mr. Altobelli is not required to sue the firm, and he is not suing the firm or seeking relief from the firm. In fact, the essence of this case is that it is against individuals and not the firm.⁸ The firm has filed papers in this case declaring that it is not a party, and defendants have also filed papers that attempt to use the individual liability character of this case to their advantage.⁹ Defendants simply cannot escape the courtroom by hiding behind the firm or by mischaracterizing this action as one against the firm.

It is well established that corporate employees and officials are personally liable for all tortious acts in which they participate, regardless of whether they are acting on their own behalf or on behalf of a company. *Joy Management Co v City of Detroit*, 183 Mich App 334, 345; 455 NW2d 55 (1990) citing *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). Mr. Altobelli has a right to pursue individual liability actions against these individuals who committed torts against him and there is absolutely nothing improper about suing defendants in court.

In the end, firm principals could have chosen standard arbitration language. They could have written §3.6 in such a way that it covered *any* dispute “arising out of or relating to” the Operating Agreement. They knowingly chose otherwise. They chose to confine arbitration to disputes between the firm and its principals. The defendants are the parties trying to nullify their

⁸Mr. Altobelli is not suing the firm because it would be improper to hold the firm liable for defendants’ unauthorized deprivation of his ownership rights which is the central component of every claim in this case. It is this “watershed” decision by defendants that triggered this suit. By statute, defendants did not act as agents of the firm and the firm is not bound by their unauthorized conduct. See MCL 450.4406.

⁹For example, in the Court of Appeals, defendants repeatedly emphasized that this is an individual liability action and, as such, Mr. Altobelli was required to prove his claims against each defendant individually and that each defendant had to be treated separately and not collectively as a group.

own arbitration provision, not Mr. Altobelli. This individual liability action is not an action against the firm and that is the end of the matter.

RELIEF REQUESTED

Based on the foregoing, plaintiff/appellee, Dean Altobelli, respectfully requests that this Court deny Defendants/Appellants' application for leave to appeal the Court of Appeals November 4, 2014 decision insofar as that decision affirmed the circuit court's order denying Defendants' motion to compel arbitration.

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Dated: March 17, 2015